Progressive Insurance Sdn Bhd v Gaya Underwriting Services Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-04-73 OF 1995
NH CHAN, MAHADEV SHANKAR AND AHMAD FAIRUZ JJCA
12 MAY 1997

Arbitration *— Arbitrator — Misconduct — Bias — Allegation that arbitrator had personal interest in subject matter of the suit which disqualified him from acting — Whether real likelihood of bias must be shown — Arbitration Act 1952 s 24*

The appellant and the respondent were parties to an arbitration award handed down by the arbitrator in relation to a claim for money due from the respondent to the appellant. The respondent applied to the High Court to set aside the award on the ground that the arbitrator was guilty of misconduct. In support of its application to set aside the award, the respondent alleged that it was aware that the arbitrator was the Executive Director of a company called Mega First Corp Bhd ('Mega'). This fact was known to the respondent at the very least from 29 October 1993. The respondent then discovered that the Sabah Economic Development Corp ('SEDCO') — the investment arm of the Sabah State Government — was a major shareholder of Mega, and that the appellant was approximately 80% owned by the Sabah State Government. The respondent's allegation was that the arbitrator therefore had a personal interest in the subject matter of the suit which disqualified him from acting. The High Court granted the respondent's application and set aside the award. The appellant appealed.

Held, allowing the appeal and restoring the award:

(1) The failure of the respondent to raise the issue of the Sabah Government's substantial ownership of the appellant and SEDCO, and that it was sufficient to disqualify the arbitrator in view of SEDCO's holding in Mega in October 1993 when it was first known to the respondent precluded the respondent from raising it at all. The manner in which the respondent conducted itself in the arbitration proceedings and raised this point after failing to turn up for the hearing of the proceedings were points which in themselves concluded the matter against the respondent (see p 529A–C).

(2) It is a serious thing to allege bias against an arbitrator. If the facts had been properly understood, it should have been apparent that the objection was devoid of merit. SEDCO did not control Mega as its shareholding in Mega was just about 9.12% and it had no shares in the appellant. The appellant had no shares in Mega, nor did Mega have any shares in the appellant. From any point of view, Mega did not have any pecuniary interest whatsoever in any award that the arbitrator could make in favour of the appellant.

A The respondent had not condescended on any particulars as to how it could be suggested that the arbitrator may be thought to be biased. A real likelihood of bias must be shown not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries. In this case, the B respondent's pretexts were intended to create a sinister impression which the facts did not support (see pp 529C–E, G and 530C, F); *R v Camborne Justices, ex p Pearce* [1955] 1 QB 41; [1954] 2 All ER 850 followed.

C **[Bahasa Malaysia summary**

Perayu dan penentang adalah dua pihak di dalam suatu award timbangtara yang diberi oleh penimbangtara berkaitan dengan suatu tuntutan untuk wang yang patut diberikan oleh penentang kepada perayu. Penentang telah memohon kepada Mahkamah Tinggi supaya D award tersebut diketepikan atas sebab penimbangtara telah salah laku. Dalam menyokong permohonannya untuk mengetepikan award tersebut, penentang telah mengatakan bahawa ia menyedari bahawa penimbangtara tersebut adalah Pengarah Eksekutif sebuah syarikat yang bernama Mega First Corp Bhd ('Mega'). Fakta ini diketahui oleh penentang sekurang-kurangnya sejak 29 Oktober 1993. Penentang selepas E itu telah mendapat tahu bahawa Perbadanan Pembangunan Ekonomi Sabah ('PPES') — bahagian pelaburan Kerajaan Negeri Sabah — adalah pemegang saham utama Mega, dan perayu adalah kira-kira 80% dimiliki oleh Kerajaan Negeri Sabah. Penentang mengatakan oleh kerana ini, penimbangtara ada kepentingan peribadi di dalam isi F guaman ini yang menyebabkannya tidak layak berfungsi. Mahkamah Tinggi membenarkan permohonan penentang dan mengetepikan award tersebut. Perayu membuat rayuan.

Diputuskan, membenarkan rayuan dan mengembalikan award:

G (1) Kegagalan penentang untuk mengemukakan isu bahawa Kerajaan Sabah memiliki sebahagian besar perayu dan PPES, dan bahawa ia adalah mencukupi untuk menyebabkan penimbangtara tidak layak memandangkan pemegangan PPES di dalam Mega pada Oktober 1993 apabila buat kali pertama diketahui oleh penentang, menghalang penentang daripada membangkitkannya. Cara H penentang mengendalikan diri di dalam prosiding timbangtara, dan pembangkitan perkara ini selepas gagal menghadiri pembicaraan prosiding adalah perkara-perkara yang sendirinya menyelesaikan hal ini bertentangan dengan penentang (lihat ms 529A–C).

I (2) Ia adalah perkara yang serius untuk menuduh penimbangtara berat sebelah. Jika fakta-fakta telah difahami dengan baik, ia sepatutnya jelas bahawa bantahan ini tidak mempunyai merit. PPES tidak mengawal Mega kerana pemegangan saham dalam Mega hanya 9.12% dan ia tidak mempunyai saham dalam perayu.

Perayu tidak mempunyai saham dalam Mega, begitu juga Mega tidak mempunyai saham dalam perayu. Dalam sebarang pandangan, Mega tidak mempunyai sebarang kepentingan kewangan di dalam apa-apa award yang penimbangtara boleh buat yang memihak kepada perayu.

Penentang tidak memberikan sebarang butiran mengenai bagaimana ia boleh dicadangkan bahawa penimbangtara adalah berat sebelah. Berat sebelah yang benar-benar berkemungkinan mesti ditunjukkan bukan sahaja daripada fakta material yang telah dipastikan oleh pihak mengadu, tetapi daripada fakta selanjutnya yang mungkin dipastikan dan ditentusahkannya dalam perjalanan pertanyaannya. Dalam kes ini, helah penentang adalah bertujuan untuk menimbulkan tanggapan mencurigakan yang tidak disokong oleh fakta-fakta (lihat ms 529C–E, G dan 530C, F); *R v Camborne Justices, ex p Pearce* [1955] 1 QB 41; [1954] 2 All ER 850 diikut.]

Notes

For cases on arbitrator, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 719–734.

Cases referred to

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213 (refd)

R v Camborne Justices, ex p Pearce [1955] 1 QB 41; [1954] 2 All ER 850 (folld)

R v Rand (1866) LR 1 QB 230 (refd)

Legislation referred to

Arbitration Act 1952 s 24

Companies Act 1965 s 128

Appeal from: Originating Motion No R2–25–58 of 1994 (High Court, Kuala Lumpur)

Renu Zechariah (*S Ravichandran* with her) (*Anad & Noraini*) for the appellant.

Ranjit Singh (*Cheang & Ariff*) for the respondent.

Mahadev Shankar JCA (delivering the judgment of the court): The appellant ('Progressive') and the respondent ('Gaya') were parties to an arbitration award handed down by the arbitrator Mr M Sivalingam on 17 April 1994. Thereafter, Gaya successfully obtained an order under s 24 of the Arbitration Act 1952 from the High Court setting aside the award on the ground that the arbitrator was guilty of misconduct. We allowed the appeal, set aside the High Court order and restored the award. Our reasons now follow.

Gaya had been appointed the underwriting agents of Progressive by an agency agreement dated 1 July 1980. By a letter dated 1 October 1984,

A Progressive terminated this agency agreement. On that date, Progressive claimed that RM2,193,897.35 was due to them from Gaya for the Kota Kinabalu branch alone. Subsequently, the parties entered into a second agency agreement under which Gaya was required to furnish a bank guarantee for RM300,000 and Gaya's directors were also required to furnish a joint and several guarantee in favour of Progressive. This second B agency agreement contained an arbitration clause.

On 2 November 1985, Progressive terminated the second agreement, and called in the bank guarantee. By 31 July 1988, Progressive computed the total amount due from Gaya to be RM2,604,190.08.

C At the time, Mr M Sivalingam was an advocate and solicitor in Messrs Kean Chye & Sivalingam. Both parties agreed that he be appointed as the arbitrator. The statement of claim was filed on 11 August 1988. Gaya was represented by Messrs PG Lim & Co, who filed a defence and counterclaim shortly thereafter. To this, Progressive's solicitors filed a reply on 31 October 1988. The pleadings were thus closed.

D In March 1989, Mr Sivalingam withdrew as arbitrator on grounds of personal illness and suggested that another arbitrator be nominated. When a substitute could not be found, the parties agreed in March 1990 that Mr Sivalingam's offer to continue be accepted. Dates for hearing were fixed in November 1991. On Gaya's application, the matter was adjourned E to February 1992. In January 1992, both parties agreed to the appointment of Arthur Andersen to audit the accounts and produce a report. After this, Gaya went back on its agreement to Arthur Andersen and Coopers & Lybrand was jointly appointed. Because of disagreement as to their fees, each party then appointed their own auditors. At Gaya's request, the arbitration was postponed to January 1994 and then to March 1994, when F the case was again adjourned to 19 April 1994 because Gaya's solicitors discharged themselves. The arbitrator finally heard the matter on 19 April 1984, and gave his award the same day.

At all material times, Gaya's Managing Director was Lawrence Sinsua ('Sinsua'). On 1 June 1994, he affirmed an affidavit in support of his G application to set aside the award. In it, he affirmed that even prior to the hearing fixed on 21 March 1994, he was already aware that Mr Sivalingam was working in a company called Mega First Corp Bhd ('Mega'). This fact was known to Sinsua at the very least from 29 October 1993. This was the date of a letter from Mr Sivalingam to the solicitors of both parties to confirm that the hearing dates had been changed to 17–21 January 1994. H This letter is on Mr Sivalingam's letterhead c/o Mega. On some date thereafter which Sinsua has seen fit not to disclose, he says he was looking through a magazine whilst waiting to see the Chief Minister of Sabah. He came across an article on Mega. He was curious to find out what the article had to say because he knew Mr Sivalingam was working in Mega. He then I discovered that the Sabah Economic Development Corp ('SEDCO') was a major shareholder of Mega, and upon inquiring further he discovered that Mr Sivalingam was an Executive Director of Mega, that SEDCO owned 17,787,480 shares of Mega, and that Progressive is approximately 80% owned by the Sabah State Government. Sinsua's allegation is that

Mr Sivalingam therefore had a personal interest in the subject matter of the suit which disqualified him from acting. A

But notwithstanding his alleged sentiment, he took no timeous action on the matter. He knew that the hearing was fixed for 23 March 1994. All that happened on that day was that Sinsua did not turn up at the hearing. Nor did his solicitors, Messrs PG Lim & Co, who informed the arbitrator B that they had received no instructions from Gaya who were aware of the hearing. Progressive's lawyers and witnesses had turned up but the arbitrator decided to postpone the hearing to 19–24 April 1994 to give Gaya a final opportunity to present themselves failing which he would proceed by default.

This decisions was confirmed in the arbitrator's letter to Gaya dated C 23 March 1994 (see Appeal Record p 157/158). Sinsua replied. He pre-dated his reply 4 March 1994. In it, he stated his objection to Mr Sivalingam, stating that he did not doubt Mr Sivalingam's integrity but that the possibility of apparent bias made it undesirable for Mr Sivalingam to act.

Mr Sivalingam faxed and wrote back on 11 April 1994 that he was in D no way accountable to SEDCO, and that there was no question of discharge. In the arbitrator's words, what then happened was this:

> 10 Mr Lawrence made an oral application that I should be removed on the grounds stated in his letter dated 4 March 1994. I explained to him that: (a) Mega First Corp Bhd in which I was an Executive Director had no interest whatsoever in Sabah Economic Development Corp; E and (b) I was not even aware that Sabah State Government owned the claimant company. Mr Lawrence submitted that even though he had no doubt about my integrity, I should still be removed.
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> Mr Anad counsel for the claimants objected and gave his grounds. He also referred me to the case of *Bremer v Soles* [1985] 2 Ll LR 199. F
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> I dismissed the application.
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> 11 Mr Lawrence after that first oral application made a second application for me to postpone the matter as he wanted to apply to the High Court to remove me. Mr Anad objected to the application. This application was considered and dismissed.
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> 12 Mr Lawrence then made a third application for postponement and his G grounds were as follows:
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> (1) He would like to engage another lawyer.
> (2) He is having discussions to try and settle the matter.
> (3) There has been a change of government in Sabah and all the agencies are being audited and this exercise will include the claimants. H
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> Mr Anad objected to the application and stated:
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> (1) Respondents have had ample opportunity to engage another lawyer.
> (2) No settlement talks were in progress and the respondents have had about eight years since the dispute first arose to settle the matter.
> (3) Change of government in Sabah is irrelevant. I
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> This request for postponement was also dismissed and Mr Lawrence left the hearing saying that he did not want to participate further in the proceedings.

A In the court below, the learned judge thought that the Sabah Government's substantial ownership of Progressive and SEDCO was sufficient to disqualify the arbitrator in view of SEDCO's holding in Mega. Indeed, En Ranjit Singh conceded that this is the only ground that he could rely upon.

B For ourselves, we should have thought that the failure of Gaya to raise this point in October 1993 precluded Gaya from raising it at all. Being public companies, all the entities involved are open to the world. The manner in which Gaya conducted itself in these proceedings and raised this point after failing to turn up for the hearing fixed for 23 March 1994 are points which in themselves conclude the matter against them.

C However, it is a serious thing to allege bias against an arbitrator. If the facts had been properly understood, it should have been apparent that the objection was devoid of merit.

Mega at the material time had a paid-up capital of RM194m. SEDCO's shareholding was just about 9.12%. In other words, SEDCO D did not control Mega.

SEDCO was an independent corporation. It had no shares whatsoever in Progressive. And as for Progressive, it had no shares in Mega, nor did Mega have any shares in Progressive. From any point of view, Mega did not have any pecuniary interest whatsoever in any award that the arbitrator E could make in favour of Progressive.

The subject matter of the dispute is also not irrelevant. This was a claim for money due from Gaya to Progressive for insurance policies written by Gaya in the name of Progressive. Gaya were del credere agents, ie it was obliged to account for and pay to Progressive the premiums due F on all Progressive policies issued regardless of whether Gaya had been paid by the policy holders. The quantum turned on the auditor's reports. There is no suggestion of any bias on their part.

Indeed, Mr Sinsua has not condescended on any particulars as to how it could be suggested that the arbitrator may be thought to be biased. He has said on oath that he does not doubt Mr Sivalingam's integrity. Nor G does Mr Sinsua's counsel suggest otherwise.

What the submission amounts to therefore is that from the primary facts that the Sabah State Government owns 80% of Progressive, and SEDCO owns 9.2% of Mega, apparent bias on the part of the arbitrator must be inferred because SEDCO is the investment arm of the Sabah H State Government.

This is such an obvious *non-sequitur* that it is somewhat surprising that it was not rejected out of hand in the court below. It is significant that having acknowledged Mr Sivalingam's integrity, he made no effort whatsoever to show precisely in what way the relationship of the four I entities involved could result in the arbitrator being obliquely influenced to decide in Progressive's favour. Mr Sinsua's counsel speculated that SEDCO could have held the gun to Mr Sivalingam's head by applying to remove Mr Sivalingam as a director of Mega under the powers conferred

by s 128 of the Companies Act 1965 if he did not decide in favour of Progressive. This is so far-fetched that it is undeserving of any comment. Nor was such a submission made in the court below.

In *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213, this court dealt in some depth with the test for a real likelihood of bias. We only need repeat a passage from *R v Camborne Justices, ex p Pearce* [1955] 1 QB 41 at pp 51–52 (also at [1954] 2 All ER 850 at p 855) where Slade J formulated the test prescribed by Blackburn J in *R v Rand* (1866) LR 1 QB 230 at p 232 thus:

> ... that, to disqualify a person from acting in a judicial or quasi-judicial capacity upon the ground of interest (other than pecuniary or proprietary) in the subject matter of the proceedings, a real likelihood of bias must be shown ... *not only from the materials in fact ascertained by the party complaining, but from such further facts as he might readily have ascertained and easily verified in the course of his inquiries.* (Emphasis added.)

and continued:

> The frequency with which allegations of bias have come before the courts in recent time seems to indicate that Lord Hewart's reminder in *R v Sussex Justices, ex p McCarthy* [1924] 1 KB 256 at p 259, that it 'is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done' is being urged as a warrant for quashing convictions, or invalidating orders upon quite unsubstantial grounds and, indeed, in some cases upon the flimsiest pretexts of bias. Whilst indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done.

Mr Sinsua's pretexts were intended to create a sinister impression which the facts do not support. We therefore allowed the appeal, set aside the order of the court below, gave the appellant his costs before us and in the court below; and ordered a refund of the deposit. The arbitrator's award still stands.

Appeal allowed.

Reported by Jafisah Jaafar